Supreme Court, U.S.
FILED
941469 MAR 2 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

NICKY JOE RANDOLPH,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Petition For A Writ Of Certiorari To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the denial of the right to make a post conviction or collateral attack on the sufficiency of the evidence is a denial of Due Process and Equal Protection, violating the Fifth and Fourteenth Amendments, when the trial evidence did not establish, and the post conviction Court held that the record is devoid of any proof of deliberation, an essential element of first degree murder, thus allowing the State to obtain a conviction without being required to prove each essential element of first degree murder beyond a reasonable doubt?

II. Whether arbitrarily requiring a defendant to serve the balance of a life sentence imposed for first degree murder is cruel and unusual punishment and/or a denial of Due Process and Equal Protection, in violation of the Eighth, Fifth and Fourteenth Amendments, when the trial judge on post conviction or collateral review held that the evidence did not support the verdict since the State had failed to prove each essential element of first degree murder beyond a reasonable doubt?

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Petition For A Writ Of Certiorari To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Nicky Joe Randolph, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Tennessee Court of Criminal Appeals, entered on August 11, 1994, petition to rehear denied September 6, 1994, and the application for permission to appeal to the Tennessee Supreme Court, denied December 5, 1994.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals reversing the trial court and reinstating Petitioner's first degree murder conviction and life sentence,

dated August 11, 1994, is reprinted in the appendix at App. 1 - App. 12.

The judgment of the Tennessee Court of Criminal Appeals, which accompanied the opinion, also being dated August 11, 1994, is reprinted in the appendix at App. 13 - App. 14.

The judgment and order of the Roane County Criminal Court holding that the State did not prove each essential element of first degree murder at the Petitioner's trial and directing that the Petitioner's first degree murder conviction be set aside and entering in place thereof a conviction for second degree murder, dated May 19, 1993, is reprinted in the appendix at App. 15 - App. 16.

The order of the Tennessee Court of Criminal Appeals denying the petition for rehearing, dated September 6, 1994, is reprinted in the appendix at App. 17 - App. 18.

The order of the Tennessee Supreme Court denying the application for permission to appeal, dated December 5, 1994, is reprinted in the appendix at App. 19.

JURISDICTION

The judgment and opinion of the Tennessee Court of Criminal Appeals was entered on August 11, 1994. The petition to rehear was denied on September 6, 1994. The application for permission to appeal to the Tennessee Supreme Court was denied on December 5, 1994. Petitioner would respectfully submit that this Petition for Writ of Certiorari is timely filed within the ninety day

time period permitted by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Constitution, Amendment XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In November of 1985, Nicky Joe Randolph, being seventeen (17) years old at the time, was involved in an altercation with a man outside of a convenience store in Harriman, Tennessee, which resulted in the man's death. Nicky Joe Randolph turned himself in, confessed without the benefit of Counsel, then was arrested and charged with first degree murder. The Roane County Juvenile Court transferred the case to the Roane County Criminal Court before Honorable E. Eugene Eblen, Judge, for trial as an adult. In July of 1986, Nicky Joe Randolph was convicted of first degree murder and sentenced to life in prison. His conviction was upheld on direct appeal to the Tennessee Court of Criminal Appeals, with permission to appeal being denied by the Tennessee Supreme Court, therefore concluding review of his direct appeal in May of 1988.

In January of 1989, Nicky Joe Randolph filed a *pro se* petition for post conviction relief alleging, among other things, that he was denied the effective assistance of Counsel. Although the Court had previously appointed two different lawyers to represent Petitioner, no action was taken on the petition until his family retained present Counsel to represent him. On June 11, 1992, by agreement of the State, newly retained Counsel filed an amended petition for post conviction relief alleging several grounds for relief. These grounds included the issue regarding insufficient evidence to support the jury verdict of guilty beyond a reasonable doubt of first degree murder since the State had failed to prove each essential element of first degree murder at the Petitioner's trial on the merits. This issue was raised in light of the newly

announced Tennessee Supreme Court decision in *State v. Brown*, 836 S.W.2d 530 (Tenn., 1992), which was announced ten days earlier on June 1, 1992.

In *Brown*, the Tennessee Supreme Court, Justice Daughtery writing for the Court,[1] stated that since as early as 1872, Tennessee prosecutors **and judges** [emphasis added] had been improperly commingling the terms "premeditation" and "deliberation" using them interchangeably.[2] The Court went further in stating that " . . . deliberation requires some period of reflection, during which the mind is 'free from the influence of excitement, or passion'."[3]

On July 20, 1992, the trial court, Honorable E. Eugene Eblen[4], held a hearing on Nicky Joe Randolph's petition for post conviction relief, hearing testimony of witnesses and argument of Counsel. In addition to other argument, Petitioner's Counsel argued, in light of the Tennessee Supreme Court's ruling in *State v. Brown, supra*, that Tennessee prosecutors and judges had been improperly merging and commingling the terms "premeditation" and "deliberation". And further that, in effect, the State had not been required to prove each essential element of first degree murder beyond a reasonable doubt. Counsel

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[1] The author of the *Brown* opinion, Justice Martha Craig Daughtery, is now a Judge on the Federal Sixth Circuit Court of Appeals.

[2] 836 S.W.2d 530, at 538.

[3] *Id.* at 540.

[4] Judge Eblen was the trial judge at the original trial on the merits in 1986 and at the hearing on the post conviction petition in 1992.

argued that because of this possible failure of the State to prove each essential element of first degree murder that the Court should review the evidence to determine whether the State had, in fact, proven each essential element of first degree murder beyond a reasonable doubt. Counsel also argued and averred that the State had, in fact, failed to prove premeditation and deliberation such that the Petitioner was entitled to a new trial on the merits. Counsel argued alternatively that the Court should follow the Tennessee Supreme Court's example in *Brown, supra,* vacate the first degree murder conviction and enter a conviction, which was supported by the evidence, to that of a lesser included offense. At the conclusion of the hearing, the Court took the matter under advisement and directed Counsel for both sides to submit briefs on the matter.

On May 19, 1993, after having the case under advisement for ten months, the trial court, Judge Eblen, entered a ruling holding that the State had failed to prove the essential element of deliberation and that at the trial on the merits, the State had not offered any proof of deliberation, nor proof that the Petitioner was free from the passion of the moment during the altercation between the Petitioner and the victim. The Court further clearly held that the Defendant had acted maliciously, in the heat of excitement and passion and without adequate provocation, but **without deliberation** [emphasis added]. The Court set aside the Petitioner's first degree murder conviction and entered a conviction for second degree murder.[5]

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[5] Judge Eblen's order setting aside Petitioner's first degree murder conviction is reprinted in the appendix at App. 15 - App. 16.

On June 28, 1993, the Court sentenced the Petitioner to twelve (12) years for second degree murder. Although the State appealed Judge Eblen's ruling, it did not seek a stay of his ruling from either the trial or appellate courts while the case was on appeal. The Petitioner subsequently met with the Tennessee Parole Board, which determined that the Petitioner was eligible for immediate parole and directed that he be released upon parole as soon as the paperwork could be completed. Upon his release from custody, Nicky Joe Randolph was allowed to transfer his parole supervision to the State of Georgia where his father resides.

Pursuant to U.S. Supreme Court Rule 14.1(h), Petitioner would respectfully submit that the federal questions sought to be presented to this Court for review were properly and timely raised in the trial court when he attacked the sufficiency of the evidence and the fact that the State had not proven the essential elements of premeditation and deliberation. The issue was also raised in his appellate brief to the Tennessee Court of Criminal Appeals when he again argued that the State had not proven deliberation, an essential element of first degree murder. Further, in response to the State's assertion that the Supreme Court's holding in *Brown, supra,* was not constitutionally based, that

> " . . . the State essentially argues that . . . the Supreme Court's holding in *Brown* was not constitutionally based and was intended only to clarify the definition of the elements that must be proved in order to support a conviction for first degree murder. The Petitioner would respectfully disagree and take issue with that

> position. Petitioner respectfully asserts that certainly the Supreme Court's holding in *Brown* is constitutionally based. The constitutional right to due process, equal protection under the law as well as the right to a fair trial and the right against cruel and unusual or excessive punishment."[6]

On August 11, 1994, the Tennessee Court of Criminal Appeals reversed Judge Eblen holding that the issue of sufficiency of the evidence had already been decided on direct appeal and that the issue was barred because it had been previously determined. The Court of Criminal Appeals set forth the facts of the case as were summarized in that Court's decision on direct appeal in March of 1986; however, the Court did not review those facts in light of the *Brown* decision, in order to ascertain whether Judge Eblen, who was also the original trial judge during the trial on the merits, was correct in his interpretation of the trial evidence or his finding that the State had not offered any proof of deliberation. The Court of Criminal Appeals did not disagree with Judge Eblen's findings on the evidence or his ruling that the State had failed to prove deliberation. Rather, the Court simply deferred to the earlier court's ruling on the sufficiency of the evidence question and held that it was improper for Judge Eblen, on post conviction or collateral review, to have reviewed the sufficiency of the evidence question in the first place. The Court, in its opinion, did not address the

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[6] At page 13 of Petitioner's brief of the appellee, which brief is not included in the appendix at this juncture since Petitioner has made reference to the pertinent part of the record showing that the federal questions were properly and timely raised thus giving this Court jurisdiction to review the judgment on writ of certiorari.

constitutional issues raised by Petitioner, holding instead that the *Brown* decision was not retroactive and that the sufficiency of the evidence issue was barred as being previously determined.[7]

Petitioner then raised the constitutional issues in his application for permission to appeal to the Tennessee Supreme Court, and further argued that the sufficiency of the evidence question was not barred as being previously determined because no reviewing court had reexamined the sufficiency of the evidence question in light of the fact that the *Brown* decision held that prosecutors and judges had been improperly merging the terms premeditation and deliberation and therefore not requiring the State to prove each essential element of first degree murder beyond a reasonable doubt. The application for permission to appeal was denied by the Tennessee Supreme Court on December 5, 1994.[8]

While living in the Georgia community on parole, Nicky Joe Randolph was gainfully employed, had no violations of his parole and was a rehabilitated and productive member of society. He had met and married a young woman, Angela Randolph, with whom he had planned on starting a family. Because of his excellent record on parole, his parole supervision was scheduled to be discontinued on or about November 1, 1994.[9]

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[7] See pages App. 9 - App. 11 in the appendix.

[8] See page App. 19 in the appendix.

[9] This information was obtained from his Georgia parole officer, Beverly Waddle.

After the Tennessee Court of Criminal Appeals entered its ruling reversing Judge Eblen and reinstating Petitioner's conviction and life sentence for first degree murder, and after denying his petition for rehearing and an application to stay judgment, Nicky Joe Randolph voluntarily cooperated with Georgia authorities and returned to Tennessee when he was so directed. He is presently incarcerated in the Morgan County Regional Correctional Facility in Wartburg, Tennessee serving the balance of the life sentence re-imposed upon him by the Tennessee Appellate courts.

Having exhausted his remedies through the Tennessee Supreme Court, which is the court of last resort in Tennessee, Nicky Joe Randolph now respectfully presents his petition for *writ of certiorari* to this Honorable Court, which is being timely filed within the ninety day period required by Rule 13.1 of this court.

ARGUMENTS

The Petitioner raises two questions for review by this Court; however, in the interest of brevity in this petition and considering that certain arguments may be overlapping and repetitious with each other, the Petitioner joins the arguments for the two questions together.

I. **The denial of the right to make a post conviction, or collateral attack on the sufficiency of the evidence is a denial of Due Process and Equal Protection, violating the Fifth and Fourteenth Amendments, when the trial evidence did not establish, and the post conviction court held that the record is devoid of any proof of deliberation, an essential element of first degree murder, thus allowing the State to obtain a conviction without being required to prove each essential element of first degree murder beyond a reasonable doubt.**

II. **To arbitrarily require the Petitioner to serve the balance of a life sentence imposed for first degree murder is cruel and unusual punishment as well as a denial of Due Process and Equal Protection, in violation of the Eighth, Fifth and Fourteenth Amendments to the U.S. Constitution, when the trial judge on post conviction or collateral review held that the evidence did not support the verdict since the State had failed to prove each essential element of first degree murder beyond a reasonable doubt.**

In the case of *State v. Brown*, 836 S.W.2d 530 (Tenn., 1992), the Tennessee Supreme Court unequivocally stated that since as early as 1872, Tennessee prosecutors **and judges** [emphasis added] have been improperly commingling the terms "premeditation" and "deliberation" and using them interchangeably.[10] The Court further stated in noting the definitions of premeditation and deliberation that

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[10] 836 S.W.2d 530 at 538.

> *" . . . 'deliberation' is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended. 'Deliberation' is present if the thinking, i.e., the 'premeditation' is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a 'careful weighing' of the proposed decision."* C. Torcia, *Wharton's Criminal Law* § 140 (14th ed., 1979) (emphasis added in original).[11]

In this case and in others before it, the Tennessee appellate courts have repeatedly taken the position that a criminal defendant may not make a post conviction or collateral attack upon the sufficiency of the evidence used to convict him of first degree murder even though the same courts have held that Tennessee prosecutors and judges have, for more than one hundred years, incorrectly merged and commingled the terms "premeditation" and "deliberation". This improper merging, commingling, and in some cases like the instant case, the outright failure of the State to prove each essential element of first degree murder, *viz., deliberation,* have had the effect of allowing the State to obtain convictions without being required to prove each essential element of first degree murder beyond a reasonable doubt. Furthermore, if Tennessee prosecutors and judges have been incorrectly allowing convictions of first degree murder without requiring proof of each essential element, Petitioner would maintain that an aggrieved defendant

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[11] *Id.* at 541.

should at least have a threshold right to attack the sufficiency of the evidence used to obtain the conviction without summarily being denied on the basis of the earlier, and presumably tainted, review of the evidence on direct appeal.[12]

Petitioner argued to the trial court, in light of *Brown, supra,* that Tennessee Courts had been improperly merging and commingling the terms "premeditation" and "deliberation" and that the State had not been proving each individual and essential element of first degree murder. Petitioner urged the Court that a review of the trial evidence, in light of *Brown, supra,* would show that the State had not proven each separate, individual and distinguishable essential element of first degree murder beyond a reasonable doubt. The Court, after having the case under advisement for ten months, held that not only had the State not proven each essential element beyond a reasonable doubt, but also that the State had not offered any proof that the act was done with deliberation or that the Defendant was free from the passion of the moment.[13] In *Sullivan v. Louisiana,* 113 S.Ct. 2078 (1993), this Court held that

> " . . . a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt . . . " *Id.* at 2080. And, "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process

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[12] Petitioner uses the term "presumably tainted" because the initial review on direct appeal would have been conducted applying the same standards that, prior to *Brown,* were deemed adequate by Tennessee courts.

[13] At page App. 15, in the appendix.

> Clause. The prosecution bears the burden of proving all elements of the offense charged, see *e.g., Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977); *Leland v. Oregon*, 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 96 L.Ed. 1302 (1952), and must persuade the fact-finder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, *e.g., In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); *Cool v. United States*, 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (*per curiam*). This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings. *Winship, supra.*" *Id.* at 2080-2081.

This Court further stated in *Cage v. Louisiana*, 111 S.Ct. 328 (1990), that

> "In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); see also *Jackson v. Virginia*, 443 U.S. 307, 315-316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979)." *Id.* at 329.

In the instant case, having determined that the record was devoid of any proof of an essential element of first degree murder, *i.e., deliberation*, the trial court not only met, but also exceeded, the standard set down by this Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which held that

> *" . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.* See *Johnson v. Louisiana,* 406 U.S. at 362, 32 L.Ed.2d 152, 92 S.Ct. 1620." *Id.* at 318-319.

By finding that the State had not offered any proof that the act was done with deliberation or that the Defendant was free from the passion of the moment, the trial court actually met the standard set down by this Court in *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624 (1960) by holding, in effect, that the record was devoid of any evidence of certain essential elements of first degree murder, *i.e., deliberation or proof that the defendant was free from the passion of the moment.* Without the essential element of deliberation and without proof that the Defendant's actions were free from the passion of the moment, at best and in a light most favorable to the prosecution, the correct conviction could only be for second degree murder, not first degree murder.

The State of Tennessee thus far has successfully advanced the argument that *Brown, supra,* is not retroactive and should not have been applied to the instant case on post conviction or collateral review. Furthermore, the State has, again successfully thus far, argued that it was improper for the trial judge on post conviction review of this case to even consider the sufficiency of the evidence question since that question was previously addressed and decided in the State's favor in the direct appeal of this case, which was concluded in 1988. Petitioner would respectfully assert the position that the Tennessee Supreme Court's holding in *Brown, supra,* was an

announcement by the Court that Tennessee prosecutors **and judges** [emphasis added] had been, since as early as 1872, in essence, deleting or skipping the essential element of deliberation by merging and commingling it with the separate essential element of premeditation and therefore not requiring separate proof of deliberation in Tennessee first degree murder cases for more than one hundred years. While Petitioner is overjoyed that the Tennessee Supreme Court finally recognized this injustice and took steps to stop the practice of merging and commingling the two essential and distinguishing elements of first degree murder the mere cessation of the practice is inadequate to correct all those years of injustice. Petitioner would aver that an analogous argument could be made to that of affirmative action, which was enacted to correct the past injustice of slavery by providing certain benefits for the descendants of slaves. If affirmative action is an appropriate remedy for righting the terrible and horrendous past wrong of slavery, would not a second look at the evidence used to convict a person of first degree murder and to deprive him of his liberty, or potentially even his life, be a proper remedy for this past wrong by Tennessee prosecutors **and judges**? [emphasis added]

The Petitioner would respectfully suggest that anyone convicted of first degree murder between 1872 to 1992 [the date of the *Brown, supra* decision] and is still alive and in a Tennessee prison serving that sentence should have at least a threshold right to challenge the sufficiency of that evidence and have a Court take a second look to determine whether the State had, in fact, proven all the essential elements of first degree murder,

separately and individually without merging or commingling one essential element with another.

In addressing the retroactivity question thus far successfully advanced by the State, the Petitioner would respectfully suggest that clearly the Tennessee Supreme Court's announcement in *Brown, supra,* should be applied retroactively. The importance of preserving the integrity and reliability of the judicial process and our legal system in general would depend upon it. In *Brown, supra,* the Tennessee Supreme Court had the intestinal fortitude to correct a past wrong by publicly stating that Tennessee courts had fallen into the pattern of merging the two terms, premeditation and deliberation, for more than one hundred years. Petitioner would assert that this is not a new rule nor is it simply a clarification of a confusing jury instruction, but rather the announcement that *we [the Tennessee legal system] have not been properly proving each essential element of first degree murder in our cases since 1872.* Petitioner would respectfully submit that not proving an essential element of a crime can never simply be justified because of past acceptance by the courts. This Court stated in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1061, 103 L.Ed.2d 334 (1989) that

> "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding

> of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime."[14]

Is not proof beyond a reasonable doubt of each separate, individual and essential element of a crime a condition precedent to obtaining a conviction? Petitioner would respectfully argue that the growth in social capacity as well as the judicial perceptions of the Tennessee Supreme Court in recognizing the commingling of the two separate, distinguishing, and essential elements of first degree murder, *i.e., deliberation and premeditation,* should be carried a step further and rectify any conviction wrongly obtained.

This Court stated in *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), that

> "Where the Court has expressly declared a rule of criminal procedure to be 'a clear break with the past', *Desist v. United States,* 394 U.S., at 248 [89 S.Ct., at 1032] it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States v. Peltier,* 422 U.S. 531, 547, [95 S.Ct. 2313, 2322, 45 L.Ed.2d 374 (1975)" [footnotes omitted]. And, further that " . . . Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors-reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of

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[14] *Cf. Mackey v. United States,* 401 U.S. 667, at 693-694.

> the new rule-have virtually compelled a finding of nonretroactivity." *Id.* at 324-325.[15]

Petitioner would respectfully suggest that while it might be argued by the State that the announcement by the Tennessee Supreme Court in *Brown, supra,* is a "clear break with the past", and therefore not retroactive, Petitioner would submit that the only break with the past is the ceasing of the improper practice of merging and commingling two separate, distinguishable and essential elements of first degree murder and, therefore, the ceasing of the practice of allowing the State to obtain convictions for first degree murder without being required to prove each element separately and individually beyond a reasonable doubt. Surprisingly, the Tennessee Supreme Court held in *Meadows v. State,* 849 S.W.2d 748 (Tenn., 1993) that

> " . . . Stated another way, we have held retroactive application necessary when the old rule substantially impairs the truth-finding function of the trial and thereby raises serious questions about the accuracy of guilty verdicts in past trials." *Id.* at 754.[16]

Petitioner fails to understand why the Tennessee Supreme Court and Court of Criminal Appeals apparently do not believe that the old rule of merging and commingling the essential elements of first degree murder does not impair the truthfinding function of the trial nor raises serious questions about the accuracy of guilty

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[15] See also, *Yates v. Aiken,* 448 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988).

[16] *Cf. Hellard v. State,* 629 S.W.2d 4, at 7.

verdicts in past trials. This is not to mention the raising of serious questions about the integrity and reliability of the legal system in general.

Petitioner would further submit that to allow wrongly obtained convictions to stand simply because the courts had tolerated the practice for over one hundred years does not make the practice right. In other words, two wrongs do not necessarily make a right. Furthermore, looking back at *Griffith, supra,* what reliance could law enforcement authorities reasonably have, or what effect upon the Administration of Justice would there be, by not applying the correct standards to past cases? Could it be the possibility that defendants could get out of jail because their convictions were wrong in the first place? Petitioner would respectfully suggest that if this is the case, such a reliance is unreasonable and should not be a bar to correcting the past wrongs perpetrated, albeit unintentionally, by the State and the courts by not properly proving all the essential elements of first degree murder in cases such as the instant case.

Petitioner would aver that to arbitrarily require him to serve the balance of a life sentence imposed for first degree murder after the trial judge has determined that the evidence did not support that conviction amounts to cruel and unusual or excessive punishment in violation of the Eighth Amendment to the United States Constitution. Furthermore, as previously argued herein, is not the denial of the right to afford this Petitioner an opportunity to present the issue regarding sufficiency of the evidence clearly a denial of Due Process and Equal Protection of the law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution? This is especially

true where, as in the instant case, the appellate courts did not make a finding regarding the trial judge's determinations as to the sufficiency of the evidence, but rather that he should not have considered the sufficiency of the evidence question in the first place. Regardless of whether he should have considered the sufficiency of the evidence question or not, the fact remains that the trial judge did in fact consider the question and ultimately held that the evidence was insufficient since the record was devoid of any proof of deliberation, an essential element of first degree murder. To avoid the imposition of a clearly excessive sentence, *i.e., a life sentence,* imposed in a case that does not carry a life sentence, *i.e., second degree murder,* the Petitioner would need to be afforded the right to have the sufficiency of the evidence question further reviewed by the courts.

Finally, the Petitioner would respectfully suggest that as stated by this Court in *Morgan v. Illinois,* 112 S.Ct. 2222 (1992) that

> "The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 388 U.S. 257 [68 S.Ct. 499, 92 L.Ed. 682 (1948)]; *Tumey v. Ohio,* 278 U.S. 510 [47 S.Ct. 487, 71 L.Ed. 749 (1927)]" and " . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life." *Id.* at 2228.

In light of the trial court's findings in the instant case, how can it be said that the jury made a fair decision when this case was first tried in 1986, if they were not given the benefit of hearing proof of each essential element of the offense so that they could properly and carefully weigh that proof? If the jury only heard proof of some but not

all of the essential elements of first degree murder, in the name of justice, can the Petitioner's conviction be allowed to stand? Would the proof not have to consist of proof of each essential element beyond a reasonable doubt? Petitioner would respectfully submit that the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution would not allow any such conviction to stand without at least giving such an aggrieved defendant an opportunity to challenge that conviction on that basis.

A logical question for this Court to resolve in the instant case might be "when the Courts of a particular State have not been properly proving each essential element of a crime such as first degree murder, for more than one hundred years, as was determined by the Tennessee Supreme Court in *Brown, supra,* what is the appropriate remedy for correcting those past wrongs?" Petitioner would respectfully urge this Court to consider that the only fair and equitable remedy is to afford a defendant subjected to those past wrongs with the opportunity to present his claim to the Courts on post conviction or collateral review. And, if found to be appropriate after a full and fair hearing on the claim, a defendant should be afforded a new trial on the merits or, at the discretion of the Court and/or State taking into consideration the circumstances of the case and the judicial economy of a retrial, modify the conviction to that of a lesser included offense which is actually supported by the evidence introduced at trial.

Petitioner would respectfully suggest that this question needs to be answered by this Court and would respectfully request this Court to answer the question by

granting *certiorari* in this case. In closing this argument, the Petitioner would respectfully ask this Court to consider the true meaning of the inscription over the entrance to this Court: *"Equal Justice Under Law"*.

CONCLUSION

Petitioner, Nicky Joe Randolph, respectfully requests this Court to grant the *Petition for Writ of Certiorari*, reverse the Tennessee Appellate Courts, vacate his conviction and life sentence for first degree murder and reinstate the trial judge's findings in this case, which directed that the Petitioner be sentenced to twelve years for second degree murder. In the alternative, Petitioner would respectfully request that this Court remand this case to the Tennessee Appellate Courts with instructions to review the trial judge's findings on the merits of the issue that the State did not prove deliberation, an essential element of first degree murder, beyond a reasonable doubt.

Respectfully submitted,

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Attorneys for Petitioner,
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APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

APRIL 1994 SESSION

NICKY JOE RANDOLPH, JR.,	*	NO. 03-C-01-9309-CR-00309
	*	ROANE COUNTY
Appellee,	*	Honorable E. Eugene Eblen,
vs.	*	Judge
	*	(Post-Conviction)
STATE OF TENNESSEE,	*	
	*	
Appellant.	*	

(Filed Aug. 11, 1994)

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OPINION FILED: AUG 11 1994

REVERSED AND REMANDED

Walter C. Kurtz
Special Judge

OPINION

This is a post-conviction case in which the State appeals from an order entered by the trial court setting aside the petitioner's conviction for first degree murder

and entering a judgment for second degree murder. We reverse.

The petitioner was convicted in 1986 of first degree murder and received a life sentence. This conviction was affirmed by this court. *See State v. Nicky Joe Randolph, Jr.*, C.C.A. No. 159 (March 17, 1986) *applic. denied* (Tenn., May 31, 1988).

On January 31, 1989, the petitioner filed a *pro se* petition for post-conviction relief alleging ineffective assistance of counsel. Subsequent to the filing of the petition, no action was taken, although the petitioner had two successive appointed lawyers. Finally, after retaining private counsel, an amended petition for post-conviction relief was filed on June 11, 1992. This amended petition set forth in some detail the allegations related to ineffective assistance of counsel and pertinent to this appeal, stated that pursuant to the case of *State v. Mack Edward Brown*, 836 S.W.2d 530 (Tenn. 1992), "the evidence presented in this case was insufficient as a matter of law to support a jury finding of guilty beyond a reasonable doubt since the State failed to prove each of the individual elements of the offense of murder in the first degree. . . . "

The State filed an answer to the 1989 *pro se* petition. The answer of the State was essentially a general denial and stated that the petitioner was entitled to no relief. This answer was filed February 13, 1989. No written answer was filed to the amended petition.

An evidentiary hearing was held before the trial court on July 20, 1992. At the hearing, the petitioner's two

trial attorneys testified. That testimony was directed primarily to the claim of ineffective assistance of counsel, although one of the trial attorneys did direct testimony to the State's failure to prove premeditation and deliberation. When the witness opined on this issue, the Assistant District Attorney responded "Your Honor, the State likewise objects to this particular portion. This has been litigated in the motion for new trial, in the Court of Appeals, and in the application, I believe, to appeal to the Supreme Court." Related to this same testimony, the State's attorney stated "It has been previously litigated and should have no portion or significance to a post-conviction hearing." At the close of the hearing, petitioner's counsel directed no comments to the ineffective assistance of counsel issue but, rather, argued at length that at the 1986 trial, the State had failed to prove premeditation and deliberation and that the case of *State v. Brown* required that the petitioner be granted relief. He specifically stated:

> I would submit that Mr. Randolph is entitled to a new trial and should be given a new trial, but alternatively, we would ask the court to consider the second part of *Mack Brown*, wherein this case the Supreme Court vacated the conviction for first degree murder and entered a finding of guilty to the lesser included offense of second degree murder.

The trial judge then took the case under advisement. The judge requested both parties to submit additional legal authorities. The Assistant District Attorney filed a brief which is included in the record, in which he states:

> In addition, the issue of sufficiency of the evidence to support the conviction has been previously litigated as Issue Number Three (3) in the motion for new trial and also litigated in the Court of Criminal Appeals as Issue Number Three (3) which is covered on Page 5 of the Court's Opinion (a copy of that Court's Opinion has been previously attached). The Court of Criminal Appeals stated that "the evidence presented to the jury sufficiently established the elements of willfulness, maliciousness, premeditation, and deliberation. The evidence contains ample evidence for any rational jury to find beyond a reasonable doubt the Petitioner [sic] guilty of the murder in the first degree."

On May 19, 1993, the trial court issued its written opinion as follows:

> This cause came to be heard, upon petition for post-conviction relief, upon evidence presented, argument and brief.
>
> The Court is of the opinion that the defendant was not denied effective counsel. It appears from the record of the trial and testimony of defense counsel, Fritts, that she was inadequate in representation at times. However, her co-counsel, Leffew, appears to have been more than adequate in preparation and trial. Trial strategy, so long as it does not hinder the Defendant's rights or defense, must be left to the trial attorney. The Defendant is guaranteed a fair trial but not a perfect one.
>
> A review of the evidence does not show that the element of deliberation was addressed separately. The Defendant's actions with the knife and his statements afterwards are matters for

the jury to consider when deliberating on the question of premeditation. However, no proof was introduced, separate and apart, that the act was done with deliberation or that the Defendant was free from the passion of the moment.

The jury, having heard the defendant's theory, rejected self-defense of another. Therefore the Court must conclude that the act was done without adequate provocation.

The Court finds that the Defendant acted maliciously, in the heat of excitement and passion and without adequate provocation, but without deliberation.

The Court is of the opinion that the verdict of First Degree Murder should be set aside and that the conviction of the Defendant should be entered finding the Defendant guilty of Second Degree Murder.

It is therefore Ordered that the verdict of First Degree Murder be set aside and a judgment of guilty of Second Degree Murder be entered.

It is further Ordered that the Defendant be transported to Roane County Courthouse on June 28, 1993 for sentencing.

On June 28, 1993, the trial judge resentenced the defendant to twelve (12) years for second degree murder. The State appealed the trial judge's decision.

An understanding of the facts underlying the 1986 conviction are helpful in understanding this dispute. These facts are summarized in this court's decision on direct appeal.

The State's proof established that on November 25, 1985 at approximately 5:45 p.m., Joey Edwards, age 16, Robert Berquist, age 15, and Richard Jeffers were standing together outside Big John's Convenience Store in Harriman, Tennessee. Subsequently, they were joined by the defendant, age 17, and David Anderson, age unstated.

Edwards and Berquist testified that David Anderson asked Edwards for a dollar and a half. When Edwards replied that he did not have the money, Anderson inquired of Berquist, Jeffers and the defendant if they were "all in it." Receiving a negative response Anderson playfully wrestled with Edwards, picking him up as if he were going to "toss" him. As they continued "scuffling and playing", another man who knew Anderson drove up and yelled to him to leave Edwards alone. Anderson and the driver had what appeared to have been a friendly conversation.

After Jeffers had gone, David Anderson returned as Edwards and Berquist were starting home. Edwards testified:

> I was standing next to Randolph and he just reached over, I thought he had just hit David, then I . . . David grabbed his side and chest and turned around and took off running. And I heard him holler, "The S.O.B. stabbed me", and went down at Big John's.

When asked what David Anderson was doing immediately before he was stabbed, Edwards testified Anderson was "just standing there talking." Edwards saw something in the defendant's hand which he wiped off on his

"britches". When he was asked why he did it, the defendant responded that "Anderson had it coming to him."

Robert Berquist's testimony was approximately the same as Edwards' testimony.

Upon being notified of Anderson's stabbing and death, Donald Eugene Day, Sr., Chief of Harriman's police department, when to look for the defendant at his grandmother's home. Shortly thereafter he received a call to return to the police station where the defendant, his mother and an adult male were waiting to see him. The Chief was given a weapon having all the characteristics of the death weapon and as he was speaking to the mother, the defendant admitted committing the homicide. The Chief advised the defendant to "be quiet."

With the mother's consent they went to the Chief's office where after being advised of his rights the defendant gave a recorded statement which was played to the jury. A transcript of the recording is an exhibit to the record. In the recording the defendant stated that Anderson's continuous "messing" with Edwards made him mad. He claimed that Anderson grabbed his jacket and not knowing what Anderson intended, he got his knife and stabbed him.

The State's witnesses were in accord that Anderson projected himself as a "tough guy" but was not known to inflect hurt or injury. He was not taken seriously by Edwards or Berquist who testified that they were not afraid of him.

The defense presented the testimony of three acquaintances of the defendant and that of his mother. Samantha Honeycutt, age seventeen,

> described Anderson, who she feared, as having the reputation of being a violent person. Becky Bradshaw, a speech therapist, testified as to the defendant's reputation for being a peaceful law-abiding citizen. Carl Cox, the maintenance supervisor for the Michael Dunn Center, testified as to the defendant's peaceful reputation. He rated the defendant as honest and dependable.
>
> Darla Randolph, the defendant's mother, testified as to the defendant's traumatic reaction to her divorce from his father approximately two years earlier. The defendant alternated living with his father in Georgia and with her in Harriman. The defendant had just returned from Georgia some four or five days prior to the homicide. She admitted on cross-examination that she had asked the juvenile authorities for assistance with the defendant. She conceded that he was "mixed up" but denied he had ever hit her.

State v. Nicky Joe Randolph, Jr., supra, at 2-4.

In the appeal of the conviction, the petitioner challenged the sufficiency of the evidence. This court rejected petitioner's argument and stated:

> The evidence presented to the jury sufficiently established the elements of willfulness, maliciousness, premeditation and deliberation. The record contains amble [sic] evidence for any rational jury to find beyond a reasonable doubt the defendant guilty of murder in the first degree. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); and Rule 13(e) Tennessee Rules of Appellant Procedure.

> As was its prerogative, the jury rejected the defense's theory of self defense and decided the degree of the homicide. *State v. Gilbert*, 612 S.W.2d 188 (Tenn. Ct. Crim. App. 1980).

Id. at 5.

Two statutes are relevant to the disposition of this appeal.

> T.C.A. § 40-30-111. Scope of hearings. The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined, as herein defined.

> T.C.A. § 40-30-112. When ground for relief is "previously determined" or "waived." (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

The State failed to plead these statutes in its written answer. However, as mentioned previously, the Assistant District Attorney raised the issue orally several times during the hearing and stated unequivocally that it was inappropriate for the petitioner to raise issues previously litigated and decided. The Assistant District Attorney also raised the issue in his post hearing brief.

The Court is of the opinion that the State can rely upon the "previously determined" bar set forth in T.C.A. § 40-30-112.[1] A matter previously determined is not the proper subject for post-conviction relief. *See Swanson v. State*, 749 S.W.2d 731, 733 (Tenn. 1988). The issue of sufficiency of the evidence, as relates to premeditation and deliberation, was raised in the direct appeal and decided adverse to the position of the appellee. It cannot be re-litigated *See Rhoden v. State*, 816 S.W.2d 56, 61-62 (Tenn. Crim. App. 1991).

Although the petitioner does not directly raise the issue, he intimates that the decision in *State v. Brown, supra*, should be applied retroactively. This court has

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[1] The duty of the State to file an answer is mandatory. *See Malone v. State*, 707 S.W.2d 541, 543 (Tenn. Crim. App. 1985). However, the court is unaware of any case and the appellee has cited none, which precludes the State from relying on T.C.A. § 40-30-112 even if the "previously determined" issue is not included in the State's answer. The State did raise this issue orally and in its post hearing brief. Presiding Judge Jerry Scott has noted in a prior post-conviction case:

> . . . The statute provides no penalty if the District Attorney General neglects or refuses to comply with the statutory provision. However, he asks us to fashion a remedy similar to judgment on the pleadings in civil cases. Rule 12.03 T. R. Civ. P.
>
> . . . there is no provision for a judgment on the pleadings or default judgments in post-conviction cases. It has long been held that a post-conviction relief petitioner is not entitled to relief because the District Attorney General has been dilatory in the filing of his answer. *Rucker v. Tollett*, 475 S.W.2d 207, 208 (Tenn. Crim. App. 1971).

Harry Wimley v. State, No. 87-33-III (Tenn. Crim. App. Sept. 17, 1987) *applic. denied* (Tenn. Nov. 30, 1987).

previously ruled that *Brown* is not to be applied retroactively. *See Slate v. State*, C.C.A. No. 03C01-9201-CR-00014 (Tenn. Crim. App. April 27, 1994) and *State v. Willie Bacon*, C.C.A. No. 1164 (Tenn. Crim. App. August 4, 1992). Furthermore, the precise holding in *Brown* involved a confusing jury instruction. As pointed out in *Slate* the fact that such an instruction has been abandoned as confusing does not mean that its use was constitutional error. *Slate v. State, supra*, at 8.

The petitioner/appellee, cites the case of *Slate v. State, supra*, in support of his position. The *Slate* case is clearly distinguishable. In *Slate*, Judge Tipton ruled that a petitioner who had *not* previously raised a sufficiency of the evidence issue on direct appeal could raise that issue in his post-conviction proceeding. The *Slate* court held that insufficiency of evidence measured against the reasonable doubt standard is a constitutional claim under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). Judge Tipton held that the petitioner did not address the issue of sufficiency of the evidence in his direct appeal and that the issue had, therefore, not been waived. In this case, the petitioner/appellee did raise the sufficiency of the evidence on direct appeal. That issue was decided adversely to the petitioner, and pursuant to T.C.A. § 40-30-112, it cannot be re-litigated.

The decision of the trial court is reversed, and this case is remanded. The conviction for first degree murder is reinstated. The petitioner being presently on release status, the trial court is directed to have him promptly taken into custody and recommitted to the Tennessee

Department of Correction for the service of the remainder of his sentence.

/s/ Walter C. Kurtz
WALTER C. KURTZ,
SPECIAL JUDGE*

CONCUR:

/s/ Jerry Scott
JERRY SCOTT, PRESIDING JUDGE

/s/ David H. Welles
DAVID WELLES, JUDGE

---

*Judge Kurtz was sitting by designation with the Court of Criminal Appeals at Knoxville by order of the Chief Justice of the Supreme Court dated April 18, 1994.

IN THE COURT OF CRIMINAL APPEALS AT KNOXVILLE, TENNESSEE

NICKY JOE RANDOLPH, JR., Appellee,	)	ROANE COUNTY
	)	No. 9197
vs.	)	CCA NO. 03C01-9309-CR-00309
STATE OF TENNESSEE, Appellant.	)	(Post-Conviction)
	)	(First Degree Murder)
	)	REVERSED AND REMANDED

JUDGMENT

(Filed Aug. 11, 1994)

Came the Appellant, the Attorney General on behalf of the State of Tennessee, and also came the Appellee, Nicky Joe Randolph, Jr., by counsel, and this cause was heard on the transcript of the record from the Criminal Court of Roane County; and upon consideration thereof this Court is of the opinion that there is reversible error in this case, as reflected in the Opinion of this Court. A copy of the Court's Opinion shall accompany the mandate on the remand to the trial court.

It is therefore, ordered and adjudged by this Court that the decision of the trial court is reversed and this case is remanded. The conviction of first degree murder is reinstated. The petitioner being presently on release status, the trial court is directed to have him promptly taken

into custody and recommitted to the Tennessee Department of Correction for the service of the remainder of his sentence.

The costs of appeal will be paid into this Court by the Appellee, Nicky Joe Randolph, Jr., for which let execution issue. This cause is remanded to the Criminal Court of Roane County for collection of the costs adjudged therein.

WALTER C. KURTZ, SPECIAL JUDGE
JERRY SCOTT, PRESIDING JUDGE
DAVID WELLES, JUDGE

IN THE CRIMINAL COURT
FOR ROANE COUNTY, TENNESSEE

STATE OF TENNESSEE	CASE NO. 9197
VS	POST CONVICTION PETITION
NICKY JOE RANDOLPH, JR.	

(Filed May 19, 1993)

This cause came on to be heard, upon petition for post-conviction relief, upon evidence presented, argument and brief.

The Court is of the opinion that the Defendant was not denied effective counsel. It appears from the record of the trial and testimony of defense counsel, Fritts, that she was indequate [sic] in representation at times. However, her co-counsel, Leffew, appears to have been more than adequate in preparation and trial. Trial strategy, so long as it does not hinder the Defendant's rights or defense, must be left to the trial attorney. The Defendant is guaranteed a fair trial but not a perfect one.

A review of the evidence does not show that the element of deliberation was addressed separately. The Defendant's actions with the knife and his statements afterwards are matters for the jury to consider when deliberating on the question of premeditation. However, no proof was introduced, separate and apart, that the act was done with deliberation or that the Defendant was free from the passion of the moment.

The jury, having heard the Defendant's theory, rejected self-defense and defense of another. Therefore

the Court must conclude that the act was done without adequate provocation.

The Court finds that the Defendant acted maliciously, in the heat of excitement and passion and without adequate provocation, but without deliberation.

The Court is of the opinion that the verdict of First Degree Murder should be set aside and that the conviction of the Defendant should be entered finding the Defendant guilty of Second Degree Murder.

It is therefore Ordered that the verdict of First Degree Murder be set aside and a judgment of guilty of Second Degree Murder be entered.

It is further Ordered that the Defendant be transported to Roane County Courthouse on June 28, 1993 for sentencing.

This the 19th day of May, 1993

/s/ E. Eugene Eblen
JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

NICKY JOE RANDOLPH, JR.,	*	NO. 03-C-01-9309-CR-00309
	*	ROANE COUNTY
Appellee,	*	Honorable E. Eugene Eblen,
vs.	*	Judge
	*	(Post-Conviction)
STATE OF TENNESSEE,	*	
	*	
Appellant.	*	

ORDER

(Filed Sep. 6, 1994)

The appellee, Nicky Joe Randolph, has filed two post judgment pleadings. He has filed a motion for stay of execution of this court's judgment of August 11, 1994, as well as a petition to rehear.

The petition to rehear raises no issue not previously raised. The issues were well considered by the court and the court declines to reconsider them.

The court has further considered the reasons for the stay set forth in the motion and finds them to be insufficient.

The motion to stay execution of the judgment is denied. Furthermore, the petition for rehearing is denied.

/s/ Walter C. Kurtz
WALTER C. KURTZ,
SPECIAL JUDGE*

CONCUR:

/s/ Jerry Scott
JERRY SCOTT, PRESIDING JUDGE

/s/ David H. Welles
DAVID WELLES, JUDGE

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*Judge Kurtz was sitting by designation with the Court of Criminal Appeals at Knoxville by order of the Chief Justice of the Supreme Court dated April 18, 1994.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

NICKY JOE RANDOLPH, JR.	)	
v.	)	NO. 03-C-01-9309-CR-00309
STATE OF TENNESSEE	)	ROANE COUNTY

ORDER

(Filed Dec. 5, 1994)

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be, and is, hereby denied.

PER CURIAM